JAN 18 1967

No. 888

SUPREME COURT, U. S.

In the

Supreme Court of the United States

OCTOBER TERM, 1966

HARRAH'S CLUB,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF ALLADIN HOTEL, DESERT INN HOTEL, DUNES HOTEL, HACIENDA HOTEL, HOTEL RIVIERA, SAHARA HOTEL, SANDS HOTEL, STARDUST HOTEL, THUNDERBIRD HOTEL, HOTEL TROPICANA, EL CORTEZ HOTEL, FREMONT HOTEL, HORSESHOE HOTEL, GOLDEN GATE, PIONEER CLUB, MINT HOTEL, CALIFORNIA CLUB, LAS VEGAS CLUB, LUCKY STRIKE AND THE NEVADA RESORT ASSOCIATION TO PARTICIPATE AS AMICUS CURIAE AND TO FILE ATTACHED BRIEF IN THAT CAPACITY.

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In The
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October Term, 1966

No. 888

HARRAH'S CLUB,
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vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO PARTICIPATE AS AMICUS CURIAE

SIDNEY R. KORSHAK, DAVID H. MENDELSOHN, and FREDRIC N. RICHMAN, on behalf of ALLADIN HOTEL, DESERT INN HOTEL, DUNES HOTEL, HACIENDA HOTEL, HOTEL RIVIERA, SAHARA HOTEL, SANDS HOTEL, STARDUST HOTEL, THUNDERBIRD HOTEL, HOTEL TROPICANA, ET AL., and the NEVADA RESORT ASSOCIATION, petition this Honorable Court for permission to participate in the above-captioned matter as amicus curiae, and to file the attached brief instanter in that capacity in support of the position of Harrah's Club only insofar as it relates to the question concerning the propriety of the National Labor Relations Board exercise of jurisdiction over the Nevada Gaming Industry.

The parties have been advised of this Motion; counsel for Harrah's Club have consented to the intervention of this petitioner; counsel for the National Labor Relations Board has not consented. Service is made on both parties simultaneously with the filing of this Motion.

The Nevada Resort Association is a non-profit Nevada corporation whose members include all of the above named resort hotels and other hotels and gaming casinos in Las Vegas, Nevada.

The Ninth Circuit has sustained the Board's exercise of jurisdiction over the legal Nevada gaming industry. As a result, the interest of the members of the Nevada Resort Association have been severely affected and therefore are substantially interested in the instant appeal.

In view of these facts, your petitioners believe that an analysis of the facts and law by counsel representing a substantial number of those persons upon whom the impact of the Board's decision is most direct, will be helpful to this Court.

Petitioners ask that they be granted leave to file the attached Brief of the Alladin Hotel, Inc., et al., and Nevada Resort Association as amicus curiae in support of the position taken by Harrah's Club.

Respectfully submitted,

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BRIEF OF ALLADIN HOTEL, DESERT INN HOTEL, DUNES HOTEL, HACIENDA HOTEL, HOTEL RIVIERA, SAHARA HOTEL, SANDS HOTEL, STARDUST HOTEL, THUNDERBIRD HOTEL, HOTEL TROPICANA, ET AL., AND NEVADA RESORT ASSOCIATION AS AMICUS CURIAE

QUESTION PRESENTED

The appeal calls for review of the decision of the Court of Appeals for the Ninth Circuit in which the decision of the National Labor Relations Board to exercise jurisdiction over the legal gaming industry in Nevada was sustained, despite the continued refusal of the National Labor Relations Board to assert jurisdiction over an identical industry, to-wit: the horse racing industry. In effect, the question is: Was the National Labor Relations Board arbitrary and capricious, and did it abuse its discretion in deciding to assert jurisdiction over the Nevada Gaming Industry?

SUMMARY OF THE ARGUMENT

For many years the Board has consistently declined to exercise jurisdiction in the horse racing industry and other business enterprises related thereto because race track operations are essentially local in character and are subject to detailed state regulation. The legal gaming industry in Nevada being a substantially similar business activity as that of the race track operations is essentially local in character and is subject to detailed state regulation, perhaps more so. To assert jurisdiction over the Nevada Gaming Industry while steadfastly refusing to assert jurisdiction over racetracks is inherently discriminatory and a clear abuse of discretion.

In addition, the decision of the Ninth Circuit erroneously insisted that in view of the Board's declination of jurisdiction over the horse racing industry it is incumbent upon the Nevada Gaming industry to show how it was prejudiced by such a result. On the contrary, however, the Administrative Procedures Act demands that the Reviewing Court shall set aside an administrative agency determination where it is found to be arbitrary, capricious or an abuse of discretion. Congress has not intended the Ninth Circuit to conclude that the Nevada Gaming Industry establish that it was prejudiced by the Board's failure to assert jurisdiction over racetracks and related enterprises.

ARGUMENT

The Board Does Not Have Jurisdiction Over the Nevada Gaming Casino Industry and Its Assertion Thereof in Light of Its Non-Assertion in Race Track Industry Cases Is a Clear Abuse of Its Discretion

The Board's exercise of jurisdiction over Petitioner, as well as other Nevada gaming casinos (See *El Dorado, Inc.*, 151 NLRB No. 82 58 LRRM 1455) is improper, arbitrary and capricious because of:

(a) Its historical declination of jurisdiction in the horse racing industry, an almost identical business activity;

(b) The strict regulations imposed upon Nevada gaming casinos by the State, counties and cities;

(c) Gaming casino activities are, in fact, entertainment and amusement enterprises;

(d) A labor dispute in the Nevada gaming casino industry would have little or no impact or effect on interstate commerce;

(e) The Board's exercise of jurisdiction produces unseemly conflict between Federal and State authorities;

(f) There are no goods produced for commerce;

(g) Activities of gaming casinos and employees are purely local in nature;

(h) The exercise of jurisdiction does not effectuate the policies of the Act.

I. Power and Authority of the National Labor Relations Board

A. Power of the Board

It was the intent of Congress to give the Board ". . . the fullest jurisdictional breadth constitutionally permissible

under the Commerce Clause."[1] Today, this means that if the employers involved are within the ambit of the statutory definition of the term "employer" and if the employers' operations be considered to "affect" commerce within the rule of the decisions, such operations can be subjected to Board scrutiny. Whether or not, as a result of this scrutiny, jurisdiction will be asserted rests *in the sound discretion of the Board.*[2]

B. Discretion of the Board as to Assertion of Jurisdiction

Early recognizing the reality of time and expense considerations, the Board, through necessity, exercised its discretion and developed a system of dollar standards for jurisdictional purposes. These dollar volume demarcations were many and varied; they were significantly increased for like reasons, but policy considerations, more money and manpower later led to the reduction of the dollar amounts and to the simplification of the industrial concepts into two broad fields—retail and non-retail. The Court has approvingly pointed out that even when these dollar volume amounts are present, since they are only a quantitative standard, that ". . . the Board sometimes declines to . . . assert jurisdiction as not effectuating the purposes of the Act."[3]

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[1] *NLRB* v. *Reliance Fuel Corp.*, 371 U.S. 224, 52 LRRM 2046.

[2] See: *Office Employees, I.U.*, v. *NLRB*, 353 U.S. 313, 40 LRRM 2020, where both the majority and the dissenting opinions agreed that the employer therein met the definition of "employer" but that the policy of non-assertion of jurisdiction was not properly applied. However, both opinions recognized the power of the Board. See: *NLRB* v. *Denver Bldg. & Constr. T. Council*, 344 U.S. 675, 28 LRRM 2108.

[3] *NLRB* v. *Denver Bldg. & Const. T. Council*, supra.

Thus, from an apparent innate sense of the constitutional power of Congress and of the dual federal-state system, contemporaneously with the development of those monetary demarcations, the Board also developed in specific businesses or industries an outright policy of non-assertion of the jurisdiction. A number of businesses were affected: *the race tracks,* non-profit institutions generally, *the entertainment or amusement industry,* hotels, unions as employers, proprietary hospitals and others. This was done on an ad hoc basis, industry by industry, year by year, just as the discretionary common law writs were developed. Likewise, just as the instances of application of the common law writs are difficult to rationalize (even though they have been applied over some 400 years), so the application of the comparatively recent and yet emerging policies of non-assertion of jurisdiction by the NLRB have been difficult to rationalize, other than on an industry basis.

Nonetheless, analysis of the cases where a policy of non-assertion of jurisdiction was followed, as well as those in which this policy was asserted, but denied, is most interesting. Putting aside for the moment cases where the dollar volume demarcations were strictly observed (cases where the employers' operations were clearly within the commonly understood terms "trade or commerce" (*Federal Baseball Club, etc.,* 259 U.S. 200) it is noted that the two common tests which seem to compel (or at least importantly complete) a finding that the policies of the Act will not be effectuated by the assertion of jurisdiction are *"detailed regulation" by* and *important tax revenue flowing from Employers' operations to the state.*

Other factors are, of course, considered, but it is submitted that when the facts show licensing, control and regulation of an employer's operation and personnel by

the state and substantial tax revenue flowing to the state, the Board has disregarded large dollar amounts and followed the policy of non-assertion. This usually occurs when the employers' operations do not constitute "trade or commerce" as the terms are commonly understood (*Federal Baseball Club, etc.,* supra; *Los Angeles Turf Club,* 90 NLRB 20, 26 LRRM 1154), but are unique and peculiar and involve purely local transactions.

As noted, the policy of non-assertion of jurisdiction is an emerging or developing policy. It will be recalled that the sphere of operation of the NLRA and in consequence the extent of the mantle of NLRB jurisdiction was not entirely clear until *Guss*[4] and *Garmon*[5] were decided. A "no-man's land" was developing prior to these decisions and these decisions did not effectively dispel it. There remained a large area where the states could not act and the Board declined. The only predictable results were due to the consistent adherence by the Board to its policies of non-assertion of jurisdiction in certain industries and to its jurisdictional standards—but the latter varied with the exigency of the circumstances in which the Board found itself. It was not content to do a "half-way" job, so it still refused jurisdiction in proper cases.

This right of the Board to exercise this discretion to accept or decline jurisdiction was recognized and exercised for many years before Congress took notice.[6] When Congress took notice and acted, it expressly ratified the policies of non-assertion theretofore established by the Board by the enactment of § 14(c) of the Act.[7]

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[4] *Guss* v. *Utah Board,* 353 U.S. 1, 39 LRRM 2567 (1957).

[5] *San Diego Bldg. T. Council* v. *Garmon,* 359 U.S. 236, 43 LRRM 2838 (1959).

[6] *NLRB* v. *Denver Bldg. T. Council,* 344 U.S. 675.

[7] *Leedom* v. *Fitch Sanitarium,* 294 F.2d 251 (CADC-1961).

C. Board Policies of Non-Assertion of Jurisdiction Were Ratified by § 14(c) of the Act

In adopting this section, Congress also was concerned that the then existing monetary standards as of August 1, 1959 were continued. This surely constituted approval of the policies theretofore expressed by the Board as well as the method used by the Board to enunciate them. However, Congress did more. It also permitted the states to act in areas declined by the Board through any agency or court. This solved the "no-man's land" problem as to appropriate tribunals.

The entire section (§ 14(c)) clearly evidences Congressional intent to create a means or mode by which states can exercise jurisdiction in addition to the cession provided in § 10(a) which appears to require a little NLRA. Such is not required with respect to this discretionary power of the Board. (Similarly, as dual expert bodies, the Nevada Gaming Commission and the State Gaming Control Board were delegated wide discretions in enforcing the Nevada gaming laws and regulations and in policing the industry [Nev. Rev. Stat. §§ 463.130, 463.150, 5.010].)

The criterion for this discretion is whether or not any labor dispute which might arise involving employer's operations will have an effect on commerce substantial enough to warrant the exercise of Board jurisdiction.

Surely then, in declining to assert jurisdiction in cases sufficiently unique to require existing state regulation and control where motivation to act is supplied by large tax revenues, the Board is warranted (a) in believing that the test of § 14(c)(1) is met, and (b) that the opportunity given the state by subsection (2) to act will be exercised (the state having already acted in the field).

It thus appears that the Board has the authority to apply its policy of non-assertion of jurisdiction when, in its discretion, it deems that substantial evidence on the record warrants its application. In view of the congressional mandate, where both precedent and reason support a policy of non-assertion of jurisdiction, it will be applied.

D. The Board's Discretion Cannot Be Exercised Arbitrarily

The Administrative Procedure Act, 5 USCA § 1009(e) provides that a Reviewing Court shall act to set aside an administrative agency's findings and conclusions which are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; . . ."

We respectfully suggest that the Board's assertion of jurisdiction over the Nevada casino gaming industry in light of its refusal to assert jurisdiction over the race-track gaming industry constitutes such an abuse of discretion as would warrant this Court to act within the ambit of its authority as set forth above.

II. Board Policy of Non-Assertion of Jurisdiction in Industry Classified as Horse Racing Is Really a Policy of Non-Assertion of Jurisdiction in the Gambling Industry and Is Controlling Here

The Board policy of non-assertion of jurisdiction has been discussed more fully and reviewed more often in the horse racing business than in any other field.[8] In these opinions, the Board has repeatedly affirmed that horse racing itself as well as other businesses connected therewith and dependent thereon are essentially local in character and do not substantially affect commerce. This atti-

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[8] See, e.g., *Walter A. Kelley*, 139 NLRB 744, and cases cited therein.

tude as to the race track industry, morever, is in sharp contrast with recent Board decisions in connection with other areas of the broad field of entertainment and amusement.[9] Therefore, the factors which distinguish horse racing from amusement parks or motion pictures or boat tours are singularly important in the determination of this case. It takes only slight reflection to see the answer. Wherein nearly all other forms of entertainment are actually entertaining, *in and of themselves,* horse racing in and of itself, though possibly enjoyable to the owners, is hardly entertaining to most people who attend.

> "The increasing public interest in horse racing over baseball has little to do with the horses. The great majority of race fans know nothing about horses and care less. Watching the gees-gees circle the track soon becomes monotonous; the excitement in the stands is due to the financial stake the spectators have in the race. This is also why the 35 dog tracks in the seven states that permit greyhound racing are today almost always jammed to capacity. Elephant races would draw the same crowds if they offered the same opportunity for getting a bet down." (Scarne, *Scarne's Complete Guide to Gambling*, p. 36, third paragraph, 1961.)

The enjoyment, the entertainment, the thrill, the very purpose of going to the track is betting on one's favorite horse. The truth is, therefore, that the horse racing industry is nothing more than one phase of the gambling industry. The races are but a series of events, the outcome of which may be the subject of wagers or bets.

Having determined the essential characteristic of racing, we should now try to discover why this characteristic necessitates distinctive treatment. In other words, why has the Board declined jurisdiction in the gambling industry?

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[9] E.g., *Coney Island, Inc.*, 140 NLRB 77; *Ray, Davidson & Ray,* 131 NLRB No. 54.

The Board has revealed the reason time and again. Gambling, in the form of horse racing, is strictly controlled and regulated by state authorities. It is a state-created monopoly which is a vital element in a state's economy.[10] Thus, the state not only has a selfish interest in preserving the healthy operation and expansion of gambling on the horses, but it also has the duty of protecting the public, the employees, and the employer from the risks to which gambling is subject. In addition to actions of jockeys, themselves, in holding a horse back unnecessarily, using or not using spurs, etc., the horse could be a "ringer," or the horse could be doped to win or lose.[11] In view of this kind of analysis, the Board has wisely elected to decline jurisdiction. The ultimate reason is clearly spelled out in *William H. Dixon*:

> "[W]e do not believe that our declination of jurisdiction will leave the area of labor relations unregulated. We do not believe that state 'labor relations acts' are the only means of regulation. Nor do we regard state labor relations boards as the only state tribunals through which a state may assert jurisdiction over labor disputes, especially in view of the congressional policy ceding to any state agency or any state jurisdiction in those areas where we decline it."[12]

Thus, the Board has consistently recognized that the combination of (a) strict regulation and control by the state and (b) economic dependence by the state on the industry insures that *no labor dispute* in that industry will be permitted to have a substantial adverse effect on interstate commerce.

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[10] See *Walter A. Kelley*, supra, n. 8.

[11] Scarne, *Scarne's Complete Guide to Gambling*, p. 61, "Crooked Horse Racing" 1961.

[12] 130 NLRB 1204.

An analysis of horse racing and casino gambling demonstrates that the "reason for the rule"—the underlying cause of state licensing, regulation and control in each industry—is exactly the same.

1. Both horse racing and casino gambling are "legalized gambling."

2. Both businesses earn moneys as a percentage of the wagers placed by patrons, *Los Angeles Turf Club*, supra.

3. The wagers in both businesses are placed on the outcome of a series of events—horse races at the track, dice rolls (or the turn of cards at 21, or the appearance of certain symbols in combination on the slot machines) in casinos.

4. The state takes a percentage of wagers placed in both cases, plus licenses, etc.,

5. The law provides for the licensing of race track operators, agents and employees—the law in Nevada provides for the licensing of casino operators, agents and employees,

6. The underlying reason for such licensing in both cases is the high risk of security and integrity in both industries,

7. The need for security and integrity in both industries is due to the risks involved in gambling in both businesses, supra.

8. The results—win or loss—at horse racing depend on chance plus a number of variables.

The results—win or loss—at casino gambling depend on chance plus a smaller number of variables.

9. The odds in horse racing are initially fixed by the Track by the "pricemakers" or "handicappers" as the Track Line odds. Variables entering into the calculation are the record of each horse and of each jockey in past races, track conditions and other factors. "The Morning Line" odds appearing in the newspapers are prepared by the newspaper handicappers. Thereafter the odds change as bets are placed, going up or down depending on the amount of money wagered on a horse. Taxes and charges for operating the races are elements of the calculations.[13]

In casino gambling, the odds are fixed by the casino based on mechanical and mathematical laws of probability; with two dice there are 36 combinations, etc., etc.[14] Taxes are included in the charge for operating the games, which is an element of the calculations.

10. Both horse racing and casino gambling furnish a number of incidental services to patrons which are expected by the patrons and therefore necessary to successful operation. These services are food and drink for patrons and track and casino personnel, and in some casino operations, hotel rooms for patrons. Whether these services be furnished by the track or casino operator or by a third party, they are services which are only incidental to the gambling. As such, these services clearly come under the mantle of the

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[13] Scarne, *Scarne's Complete Guide to Gambling*, pp. 41-43, "The Track Line and The Morning Line"; p. 48, "How the Totaliser and the Pari-Mutuel Systems Work;" p. 52, "How Nickel and Dime Breakage Work"; p. 56, "How the State and Track Cuts Beat Down the Players"; 1961.

[14] *Id.*, p. 250; p. 273.

policy of non-assertion of jurisdiction possessed by the track and casino operators.[15]

Can casino gambling be distinguished in significant characteristics from the gambling industry in other states, i.e., horse racing? The answer is clearly "no." Thus, the exercise of jurisdiction by the Board is clearly an abuse of its discretion.

Many courts have had the opportunity to define "gambling," and all the definitions apply to casino gambling and horse racing equally well. The Court of Appeals for the District of Columbia Circuit stated a very brief, but inclusive, definition: "To gamble, as is well known, is to risk one's money or other property upon an event, chance or contingency in the hope of the realization of gain . . ."[16] It is clear, therefore, that the subject matter is identical.[17] Do any of the surrounding circumstances require a different rule for casino gambling? The answer is "no" because the significant surrounding circumstances are also nearly identical. In fact, the system of control and regulation in Nevada is even more extensive and thorough than the related regulation of horse racing. Furthermore, the State of Nevada is even more concerned with maintaining a healthy

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[15] *Hotel and Restaurant Employees, Union,* 148 NLRB No. 20, (1964). It will be recalled that in *Los Angeles Turf Club,* 90 NLRB, these necessary but incidental services were also rejected as a basis for denial of the policy of nonassertion of jurisdiction.

[16] *Washington Coin Mach. Ass'n.* v. *Callahan,* 142 F.2d 97 (D.C. Cir.).

[17] For example, cases which hold that betting on horse races is a form of gambling, see *People* v. *Sullivan,* 60 Cal. App. 2d 539, 141 P. 230; *Young* v. *State,* 173 Tenn. 469, 121 S.W. 2d 533; *State* v. *Ak-Sar-Ben Exposition Co.,* 121 Neb. 248, 326 N.W. 736.

industry, for, should gambling disintegrate in Nevada, "the state would blow away."[18] Therefore, the ultimate grounds for attributing significance to state control and economic interests, as expressed in *William H. Dixon,* 130 NLRB No. 122, 4, and *Flatbush General Hospital,*[19] are stronger in the instant case than in the aforementioned horse racing cases. Consequently, it is not urged merely that the racing cases are closely analogous, but rather that they are well-reasoned and long-established procedent for the non-assertion of jurisdiction in the gambling industry—whether it be on the outcome of a series of races, or on the outcome of (a) rolling the dice, (b) the turn of a card, or (c) the appearance of a combination of symbols on three spinning reels in a slot machine.

III. Nevada Strictly Regulates and Controls the Gambling Industry

The entire system of Nevada regulation and control is based on the central factor that the right to *operate* or to *work* in a casino gambling establishment is a state-granted dispensation, a revocable privilege. This appears in the statement of policy:

> "1. It is hereby declared to be the policy of this state that all establishments where gambling games are conducted or operated or where gambling devices are operated in the State of Nevada shall be licensed and controlled so as to better protect the public health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada.
>
> "2. Any license issued pursuant to this chapter shall be deemed to be a *revocable privilege* and no holder thereof shall be deemed to have acquired any vested rights therein or thereunder." (Emphasis supplied.) § 463.130.

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[18] *El Dorado, Inc.* 151 NLRB No. 82.

[19] 126 NLRB No. 22.

At every turn, the applicant is reminded of this revocable privilege (Nev. Rev. Stat., §§ 463.140; 463.170; 4.010; 4.020) by the state.

Both county and city ordinances also classify the right to engage in gambling as an *operator* or an *employee* as a privilege, and retain power to revoke registration permits granted. (Henderson Nev. Ordinance § No. 10, § 9; Las Vegas Municipal Code Ord. 6-5-5 [can be revoked for conviction of two misdemeanors or a felony]; Clark County Ordinance No. 121, § 21; Regulation G-11-61, § 2.)

Fingerprints are required of all *owners, lessees* and *employees* by the State (Nev. Rev. Stat. § 463.150-2(c); § 4.030-3; § 5.100), by the Clark County (Ordinance 121, preamble; §§ 1 and 2; Regulation G-11-61 § 5(e); and by cities (§ 6-5-2 of Chapter 5, Las Vegas Municipal Code, Henderson Nev. Ordinance No. 43, § 2.)

And so the record goes; regulation upon regulation. The requirements extend to *all gambling operators* and *employees* and to other employees in other trades, such as taxi drivers, and to porters, maids, bartenders (but only when employed in connection with a gambling casino). The State Gaming Control Board is more concerned about unsavory characters employed in gambling than it is with the maid who might steal towels. The State Gaming Control Board does not get into the area of wages or hours generally, but they stopped a casino operator who was working women for shifts considered too long. The Nevada Gaming Commission has power to regulate anything directly related to the administration of the industry and could control hiring and firing practices. *El Dorado, Inc.* supra.

The state and county expressly prohibit anyone from associating with ". . . persons of notorious or unsavory

character or reputation or with extensive police records . . . either socially or in business affairs. . . ." Negotiation of a contract which affected the gaming industry with such a person would be "business affairs" within the statute. And if this person were a union business agent with whom the licensee (employer) was forced to negotiate by Federal law (which is not as strict as Nevada Gaming Law), an unseemly conflict would inevitably follow.

Enforcement policies are firm; public hearings are provided (§§ 643.312; 7.030) with the right of judicial review (§§ 463.315; 7.149). The control is necessary for security and integrity of the industry and there should not be any interference with this authority over this industry for such reasons.

In spite of all of this regulation and enforcement, cheating continues and it is difficult to catch as there are hundreds of ways to cheat a slot machine. Only about 50% of cheats are detected even though undercover enforcement people go around incognito to check. The reason for regulation is the casino, but it *extends to any hotel connected with it, without regard to ownership, management or control.*

In summary, the system of regulation and control of the gambling industry in Nevada is complete and quite comprehensive. It presently requires licensing, fingerprinting, investigation and many other items.

The Nevada Gaming industry is totally subjected to the state's control. There are no casino operations which are not subject to state control.

IV. The Vast Economic Importance to the State of the Tax Revenue and Jobs Provided by the Gambling Industry Is a Matter of Common Knowledge.

It is worthwhile to examine the impact of gambling on Nevada's economy. Approximately 30,000 persons are employed either directly in the gambling business or in unrelated dependent businesses. Furthermore, the amount contributed directly by the Nevada Gaming Commission to the general fund was 28.86 percent of all revenues for the fiscal year 1963-1964. That this revenue is vital to the State is apparent from the large percentage of state income it affords, and, also, from its many and varied uses in the "general fund." In addition to this, further amounts were paid by way of taxation to the counties and cities. The indirect impact can only be estimated; however, it has been reliably suggested that gambling supports roughly 60% of the general economy of the state. The Federal Courts have recognized that the gambling industry may well be the principal industry of the state.[20] In view of the aforementioned statistics, it can hardly be denied that the *proper control of gaming and continuation of the flow of revenues derived from gaming is a matter of life and death to the State of Nevada and its inhabitants.*

V. Although Horse Racing Occurs in Many States and a Great Deal of Transportation Is Involved, Casino Gambling in Nevada Is Confined to One State by Law.

A. By federal law there can be no shipment of gambling devices or paraphernalia out of state, although it can be shipped into Nevada. Title 15, §§ 1171, et seq., prohibit shipment of gambling devices and paraphernalia in interstate commerce. § 1172 provides that a state where (a) gambling

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[20] *Berman* v. *Riverside Casino Corp.*, 323 F.2d 977, 978 (9th Cir. 1963).

is legal, may (b) adopt a law exempting itself from the prohibition as to interstate shipment of such items *into the state*, but may not legally ship them out. This Nevada has done (Nev. Rev. Stat. §§ 463.410, 463.420).

NOTE: These carefully drafted provisions of federal law recognize state power; it appears they were tailored to permit Nevada to continue its state gambling business. It is the only state which permits legal casino gambling.

B. State law does not permit any licensee to own, directly or indirectly or be associated in any way with any gambling activities in other states. (Nev. Rev. Stat. § 3.060.) No doubt this is due to the fact that casino gambling is illegal elsewhere in the United States; a further reason is to insure the complete separation of Nevada gambling from all outside illegal interests, notorious and unsavory characters.

VI. All Interstate Aspects of Employers' Operations Are Minimal and Do Not Require a Denial of the Policy of Non-Assertion of Jurisdiction Long Established as to Gambling

A. No Jurisdictional Standard Is Applicable to Casino Gaming Operations

First, it must be observed that as the Board carefully pointed out in *Hialeah Race Course, Inc.*, 125 NLRB No. 57, and other cases involving other industries as to which there were no jurisdictional standards in existence on August 1, 1959,[21] the Board was free to use its discretion as to the assertion or non-assertion of jurisdiction in accordance with the Congressional mandate provided by the enactment of § 14(c) of the Act. In *Hialeah*, supra, Board precedent

[21] *Flatbush General Hospital*, 126 NLRB No. 22, approved, *Leedom* v. *Fitch Sanitarium*, 294 F.2d 251 (D.C. Cir., 1961).

(*Los Angeles Turf Club*, supra)[22] established a contrary standard—one of non-assertion of jurisdiction, which was in effect on August 1, 1959. We have demonstrated that these cases are controlling precedent in this case, because (a) the reason for the state control *is the gambling at horse races* (horse racing being only one of the modes of gambling—just as casino gambling is but another mode), (b) the same reasons for the "detailed state regulation and control" in the horse racing industry are very much in evidence in casino gambling, (c) that such regulation exists, in fact, was uncontradicted, and (d) that it is evident that Nevada *presently can and will* step in to prevent any labor dispute arising in employers' operations from substantially affecting commerce.

VII. THE NINTH CIRCUIT DECISION INCORRECTLY ESTABLISHES A NEW CRITERIA FOR REVIEWING THE PROPRIETY OF THE BOARD'S ACTION

The Ninth Circuit stated:

> "Assuming that the criteria applied by the Board in determining to exempt racetracks from regulation are equally applicable to gambling casinos in Nevada, this alone is not sufficient to establish that regulation of the gambling industry will result in unjust discrimination. It must also be shown that the gambling industry will be substantially prejudiced by Board regulation because racetracks are not similarly regulated. See *N.L.R.B.* v. *Gene Compton's. Corp., supra.*"

As pointed out above the Administrative Procedures Act merely provides that the reviewing court shall set aside the determination of an administrative agency where it was

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[22] 90 NLRB No. 10.

found to be arbitrary, capricious or constituting an abuse of discretion. Thus, it is apparent that the Ninth Circuit ignored the Congressional mandate, as aforesaid, but rather created a new rule, tailor-made for this case, to-wit: the Nevada Gaming Industry must prove that it will be substantially prejudiced by the Board's refusal to assert jurisdiction over the race track industry.

Manifestly, such a conclusion, by its very nature, is discriminatory, let alone the discriminatory nature of the Board's decision to exercise jurisdiction over one form of legalized gaming while declining to exercise jurisdiction over the other.

In the Board's decision and the Ninth Circuit decision neither adequately answered the contentions of the Nevada gaming industry. However, they implied that both forms of gaming are identical in nature, but the Board is free to act unhindered. On the contrary, the Board cannot abuse its discretion. This is precisely what has occurred herein.

CONCLUSION

No reason existed in law or fact for the Ninth Circuit's decision to sustain the Board's assertion of jurisdiction in the heavily regulated, state controlled, Nevada Gaming industry. Its standard for review are not contemplated by statute. The Board has baldly asserted that their declination of jurisdiction in racetrack gaming cases would not require them to forsake jurisdiction in the Nevada Gaming cases. Without reason, the Ninth Circuit erroneously refused to perform its responsibility.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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